UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LKQ FOSTER AUTO PARTS, INC.	
and	**CASE 19-CA-164069**
ANDREW G. BOBREK, an Individual	

BRIEF OF RESPONDENT LKQ FOSTER AUTO PARTS, INC.

Submitted by:

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Pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations and the Board's October 17, 2016 Order Approving Stipulation, Granting Motion and Transferring Proceeding to the Board, Respondent LKQ Foster Auto Parts, Inc. (LKQ or Respondent) files this brief.

I. STATEMENT OF THE CASE

The initial charge in this proceeding was filed by Charging Party Andrew G. Bobrek (Bobrek) on November 12, 2015. (Ex. A).[1] The Amended Charge was filed by Bobrek on January 28, 2016. (Ex. B).

On March 31, 2016, the Regional Director for Region 19 issued a Complaint and Notice of Hearing (Complaint) alleging that LKQ violated the Act. (Ex. C). On April 14, 2016, LKQ filed its Answer to Complaint and Notice of Hearing. (Ex. D).

[1] Throughout LKQ's Brief, citations to the Stipulated Record shall be as follows: References to facts in the Stipulation of Facts and the applicable page or pages will appear as "Stip. __." References to the Exhibits included in the Stipulation of Facts will appear as "Ex. __."

On August 26, 2016, the Parties filed a Joint Motion and Stipulation of Facts Pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. On October 17, 2016, an Order was issued approving the Joint Motion and Stipulation of Facts.

II. SUMMARY OF STIPULATED FACTS

LKQ is incorporated in Oregon and has an office and principal place of business in Portland, Oregon. LKQ's business involves the retail sale of alternative collision parts, recycled engines and transmissions, re-manufactured engines, and related products. (Stip. 2). LKQ maintains facilities in Portland, Oregon; Garden City, Idaho; Nampa, Idaho; Billings, Montana; Buckley, Washington; Napavine, Washington; and Spokane, Washington. (Stip. 3).

In September 2013, Bobrek began work for LKQ as a Forklift Operator. (Id.). Bobrek continued working for LKQ until November 12, 2015. (Id.). In February 2014, LKQ presented a Mandatory Arbitration Agreement (MAA) to Bobrek. (Id., Ex. E). LKQ has a practice of presenting the MAA to new hires as part of its onboarding process and asks the new hires to sign the MAA. (Id.).

Nothing in the Stipulated Record confirms or even indicates the circumstances in which Bobrek was presented the MAA nor whether Bobrek raised any issues or concerns regarding the MAA. The Stipulated Record is silent as to whether Bobrek asked whether he had to sign the MAA as a condition of employment or whether he was able to continue his employment with LKQ if he did not sign the MAA. Finally, the Stipulated Record is silent as to why Bobrek was presented the MAA approximately five months after beginning his employment with LKQ.

The entire MAA signed by Bobrek is included in the Stipulated Record as Attachment F. For purposes of the pending issue before the Board, the relevant portions of the MAA include:

> No claim brought under this Arbitration Agreement or that is covered by this Arbitration Agreement may be brought on a class, collective, or

> representative basis. Any claim covered by this Arbitration Agreement that has been initiated as a class, collective, or representative action shall be decided under this Arbitration Agreement as an individual claim.
>
> * * *
>
> Employee acknowledges that the Company agrees that this Arbitration Agreement is not intended to interfere with the Employee's right to collectively bargain, to engage in protected, concerted activity, or to exercise other rights protected under the National Labor Relations Act, and that Employee will not be subject to disciplinary action of any kind for opposing the arbitration provisions of this Agreement.

(Ex. F).

III. ISSUE PRESENTED

There is only one single and limited issue in this matter: whether LKQ's maintenance of its MAA violates Section 8(a)(1) of the Act because it interferes with employees' exercise of their Section 7 rights?[2]

IV. ARGUMENT AND CITATION OF AUTHORITY

In the Stipulation, the General Counsel contends that the LKQ MAA is unlawful because it "expressly prohibits employees from collectively pursuing employment-related claims in all forms." (Stip. 5). The General Counsel goes on to explain that "An employee's right to engage in collective action to redress workplace wrongs through litigation, however, is one of the core substantive rights protected by Section 7 of the Act." (Id.) Based on these assertions, the General Counsel concludes that, on its face, the MAA unlawfully restricts employees' exercise of their Section 7 rights. (Id.)

[2] As the Stipulated Record in this matter confirms, LKQ does not dispute the fact that it generally presents the MAA to employees during the onboarding process and asked them to sign. Further, LKQ does not dispute the fact that Bobrek was presented the MAA five months after his employment started and that he did in fact agree to sign the MAA. However, the Stipulated Record does not contain any facts or information relevant to how many employees were presented with the MAA, whether employees refused to sign the MAA or not, and how LKQ responded to any employees who refused or failed to sign the MAA. LKQ contends that the absence of these critical facts and information make this charge materially different from other cases addressed by the Board.

In this matter, LKQ assumes that the General Counsel will adopt the Board's arguments established by *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), its successor *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. (2014), and other more recent decisions applying the analysis established by those cases. Therefore, LKQ anticipates that the General Counsel will assert the following arguments: (1) Section 7 of the Act protects employees' right to concertedly pursue legal claims in administrative and judicial forums; (2) a mandatory arbitration agreement through which employees waive that right violates Section 8(a)(1); and (3) the FAA's saving clause precludes enforcement of the MAA according to its terms because it violates the NLRA.

LKQ respectfully submits that the Board improperly decided *D.R. Horton, Inc.*, and *Murphy Oil USA, Inc.*, and that those decisions and the arguments explained above should be rejected and that the Complaint in this matter be dismissed.

A. The Board's Interpretation of the NLRA Impermissibly Conflicts with the FAA.

1. Arbitration agreements are to be enforced according to their terms, absent an exception to the FAA. The FAA provides that an arbitration agreement "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.[3] For years, anti-arbitration "hostility . . . had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342, 131 S. Ct. 1740, 1747 (2011) (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)). Recognizing the strong national policy favoring arbitration as an efficient and inexpensive means of dispute resolution, Congress passed the FAA to stop the rampant invalidation of arbitration agreements. Id. at 333, 131 S. Ct. at 1745; see also *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304,

[3] The Supreme Court has specifically recognized that the FAA applies to arbitration agreements in the employment context. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118, 121 S. Ct. 1302, 1311 (2001).

2308 (2013) ("Congress enacted the FAA in response to widespread judicial hostility to arbitration.").

The FAA's "principal purpose" is to "ensur[e] that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 344, 131 S. Ct. at 1748 (quoting *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 1250 (1989)). Consistent with its purpose – and the "fundamental principle that arbitration is a matter of contract" – the FAA affords the parties to arbitration agreements "discretion in designing arbitration processes . . . to allow for efficient, streamlined procedures." Id. at 339, 344, 131 S. Ct. at 1745, 1749. This includes allowing parties to "specify with whom [the parties] choose to arbitrate their disputes . . . and the rules under which that arbitration will be conducted." *Am. Express Co.*, 133 S. Ct. at 2305 (internal quotations and citations omitted).

Of particular significance here, the Supreme Court's admonition holds true even if there is "unequal bargaining power between employers and employees" and even if "the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator[.]" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S. Ct. 1647, 1655 (1991).[4]

2. No exception to the FAA justifies the Board's invalidation of the Arbitration Agreement under the NLRA. There are three recognized exceptions to the FAA's general requirement that arbitration agreements be enforced according to their terms. First, an arbitration agreement cannot be enforced when the FAA's mandate has been "overridden by a contrary congressional command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 2337 (1987)). Second, an arbitration agreement may be invalidated on any ground that would invalidate a

[4] In *Gilmer*, the Supreme Court enforced a class action waiver in an arbitration agreement even though the federal statute at issue – the Age Discrimination in Employment Act (ADEA) – expressly permitted collective actions.

contract under the FAA's "savings clause." *Concepcion*, 563 U.S. at 339, 131 S. Ct. at 1746. Third, an arbitration agreement may be invalidated on "public policy" grounds where the agreement "operates . . . as a prospective waiver of a party's *right to pursue* statutory remedies." *Am. Express Co.*, 133 S. Ct. at 2310 (emphasis in original) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, fn. 19, 105 S. Ct. 3346, 3359, fn. 19 (1985)). None of these exceptions applies here.

a. The NLRA does not include a contrary congressional command. The Board cannot establish an exception to the FAA based on a "contrary congressional command" in the NLRA. To establish a "contrary congressional command," the party opposing enforcement of an arbitration agreement has the burden of proving that Congress intended through another statute to override the FAA. See *CompuCredit*, 132 S. Ct. at 672, fn. 4. Congress's intent cannot be found in ambiguous statutory language. See id. at 672 ("When [Congress] has restricted the use of arbitration . . . it has done so with [] clarity . . . ."). It must be clear from the statute's text, its legislative history, or an "inherent conflict" between arbitration and the statute's underlying purpose. *Gilmer*, 500 U.S. at 26, 111 S. Ct. at 1652. Any doubts must be resolved in favor of arbitration. *D.R. Horton*, 737 F.3d at 360. Nothing in the NLRA's text or legislative history, and no inherent conflict between arbitration and the NLRA's purpose, establishes with the requisite clarity Congress's intention to override the FAA.

i. Statutory text: The text of the NLRA does not establish an intent by Congress to override the FAA. To be sure, the NLRA does not even mention arbitration, the FAA, or the right to class or collective actions, and the Board effectively concedes as much. See *Murphy* Oil, 361 NLRB No. 72, slip op. at 12 ("[T]he NLRA does not explicitly override the FAA . . . .").

According to the Board's theory, notwithstanding the lack of explicit language in the NLRA expressing Congress' intent to override the FAA, intent should be inferred from the "broad language" of Section 7 authorizing the right to engage in concerted activity.[5] See id. ("Section 7 . . . amounts to a 'contrary congressional command' overriding the FAA. . . . The right to engage in concerted legal activity is plainly authorized by the broad language of Section 7 . . . .") (footnote omitted).

Under Supreme Court precedent, however, even where statutes provide for the right to pursue claims on a class, collective, or other group basis, the mere existence of that right is not enough to override the FAA. See, e.g., *CompuCredit*, 132 S. Ct. at 672 (finding no intent to override FAA where Credit Repair Organization Act (CROA) provides consumers a right to sue for violations and prohibits consumers from waiving their rights); *Gilmer*, 500 U.S. at 32, 111 S. Ct. at 1655 ("[T]he fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.").

For its part, the NLRA does not explicitly provide for a collective action, "much less the procedures such an action would employ." *D.R. Horton*, 737 F.3d at 360. Thus, the Board cannot rely on the text of the NLRA to establish Congressional intent to override the FAA.

ii. Legislative history: Next, the legislative history of the NLRA does not establish Congress' intent to override the FAA. Section 1 of the NLRA declares that it is the policy of the United States to protect employees' right to organize and bargain collectively with their employer "for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. In other words, Congress' intent was to "level

[5] Section 7 provides, in pertinent part, that employees have the right to engage in "concerted activities" for their "mutual aid or protection." 29 U.S.C. § 157.

the playing field between workers and employers by empowering unions to engage in collective bargaining." *D.R. Horton*, 737 F.3d at 361 (internal quotations omitted).

Congress said nothing about class or collective actions or employees' use of a particular procedural device to adjudicate claims under non-NLRA statutes when enacting the NLRA. This is not surprising, given that the NLRA "was enacted and reenacted *prior to* the advent in 1966 of modern class action practice." Id. at 362 (emphasis added). Cf. *Am. Express Co.*, 133 S. Ct. at 2306 (finding anti-trust laws do not evince an intent to preclude a waiver of class-action procedures where "they were enacted decades before the advent of Federal Rule of Civil Procedure 23 . . ."). Accordingly, the Board cannot rely on the NLRA's legislative history to establish Congress' intent to override the FAA.

iii. Inherent conflict: Finally, there is no inherent conflict between the NLRA and the FAA, which might warrant deference to the NLRA in these circumstances. As the Fifth Circuit in *D.R. Horton* observed, "courts repeatedly have understood the NLRA to permit and require arbitration" and "[h]aving worked in tandem with arbitration agreements in the past, the NLRA has no inherent conflict with the FAA." *D.R. Horton*, 737 F.3d at 361-62.[6]

b. The FAA's savings clause does not apply. Next, the Board cannot establish an exception based on the FAA's savings clause. The "savings clause" permits the revocation of a contract "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Grounds may include "generally applicable contract defenses, such as fraud, duress, or unconscionability . . . ." *Concepcion*, 563 U.S. at 339, 131 S. Ct. at 1746.

[6] In *D.R. Horton* and *Murphy Oil*, the Board actually admitted that no inherent conflict exists. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 2 (observing that the *D.R. Horton* Board found "no conflict, under the circumstances, between Federal labor law and the FAA").

However, they do not include "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Id.

In *Concepcion*, the Supreme Court held that a California rule mandating the availability of class procedures in arbitration agreements was preempted by the FAA and not rescued by the savings clause. Id. at 346, 131 S. Ct. at 1750. The Court considered whether the fact that California's prohibition on class-action waivers applied in both judicial and arbitral proceedings meant the prohibition fell within the FAA's savings clause. Id. The Court concluded it did not. Id. According to the Court, "The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," and "[r]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Id. at 344, 131 S. Ct. at 1748.

In *D.R. Horton*, the Fifth Circuit analogized the Board's holding that a class action waiver in an arbitration agreement violates the NLRA to California's rule mandating the availability of class procedures in arbitration agreements. The Fifth Circuit explained:

> Like the statute in *Concepcion*, the Board's interpretation prohibits class-action waivers. While the Board's interpretation is facially neutral – requiring only that employees have access to collective procedures in an arbitral or judicial forum – the effect of this interpretation is to disfavor arbitration. As the *Concepcion* Court remarked, "there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis."

D.R. Horton, 737 F.3d at 359 (quoting *Concepcion*, 563 U.S. at 346, 131 S. Ct. at 1750).

Thus, the FAA's savings clause does not support the position that an arbitration agreement containing a class action waiver violates the NLRA.

c. No prospective waiver of right to pursue statutory claims. The Board also cannot establish an exception to the FAA based on an argument that the Arbitration Agreement operates as a prospective waiver of employees' right to pursue statutory remedies. The Board's theory is premised on the erroneous presumption that employees have a substantive right under Section 7 to pursue class and collective claims against their employer. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 2 ("[T]he NLRA does not create a right to class certification or the equivalent, but . . . it does create a right to *pursue* joint, class, or collective claims . . . .") (emphasis in original).

It is well-established that the use of class or collective action procedures is *not* a substantive right. See *Am. Express Co.*, 133 S. Ct. at 2309 (recognizing that Rule 23 does not "establish an entitlement to class proceedings for the vindication of statutory rights"); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332, 100 S. Ct. 1166, 1171 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334 (11th Cir. 2014) (rejecting plaintiffs' argument that the "right" to a collective action under the FLSA is a non-waivable, substantive right).

Additionally, the Rules Enabling Act (REA) prohibits any interpretation of the procedural right to litigate a class action that would "abridge, modify or enlarge any substantive right." 28 U.S.C. § 2072(b); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845, 119 S. Ct. 2295, 2301 (1999). Consequently, interpreting the NLRA as providing a substantive right to participate in class actions under Rule 23 would violate the REA.

The Board's attempt to convert what has always been treated as a set of procedural rules into a substantive right under the NLRA is without support. As Member Johnson explained in his dissent in *Murphy Oil*:

> Congress and the courts, including our Supreme Court, have repeatedly characterized or held that these rules are procedural ones, not substantive rights or remedies. As an agency inferior to Congress and the courts, we are bound by that determination. We cannot simply "wave the magic wand" of NLRA adjudication over this body of law to declare what was formerly procedural to now be substantive under our statute. Indeed, coming to the correct conclusion that these rules are procedural should be fairly easy for us, since these statutes are obvious about their nature. For example, it does not take advanced legal training to determine that a set of rules entitled the "Federal Rules of Civil Procedure" are actually procedural rules.

Murphy Oil, 361 NLRB No. 72, slip op. at 36.

Accordingly, permitting employers and employees the freedom to choose the procedures by which legal claims may be brought does not infringe on any substantive rights. Consequently, the "public policy" exception to the FAA does not apply.

B. LKQ's MAA Does Not Violate the Act Because it Expressly Allows Employees to Engage in Protected Concerted Activity and Exercise Rights Under the Act.

Even if the incorrectly decided Board decisions are still applied in this case, they cannot be relied on to find that LKQ's MAA is unlawful. LKQ's MAA is materially distinguishable from the agreements, analyzed by the Board in *D.R. Horton* and *Murphy Oil*. The LKQ MAA specifically provides:

> Employee acknowledges and the Company agrees that this Arbitration Agreement is not intended to interfere with Employee's rights to collectively bargain, to engage in protected, concerted activity, or to exercise other rights protected under the National Labor Relations Act, and that Employee will not be subject to disciplinary action of any kind for opposing the arbitration provisions of this Agreement.

(Ex. E).

Contrary to General Counsel's position, the applicable language confirms and establishes that the MAA is lawful and does not violate the Act. Specifically, this disclaimer language made it clear to Bobrek, and makes it clear to any other employee, that they are only being asked to agree to accept arbitration and waive other methods of litigation that have been specifically upheld and approved by the United States Supreme Court, including access to class and collective actions.

More importantly, the applicable disclaimer language in the MAA very expressly and thoroughly notified Bobrek, and other employees, what their rights were under the Act. If one disregards the Board's unjustified and incorrect analysis regarding mandatory arbitration agreements, it is clear that this disclaimer language helps confirm and establish the lawfulness of the LKQ MAA.

V. CONCLUSION

Based on the foregoing reasons and authority, the Complaint in this matter should be dismissed.

Respectfully submitted,

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Dated this 7th day of November, 2016.

CERTIFICATE OF SERVICE

The undersigned Counsel for Respondent certifies that the foregoing has been electronically filed with the National Labor Relations Board this 7th day of November 2016, and forwarded by electronic transmission to:

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